

*****FILED UNDER SEAL*****

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Plaintiff, Donald E. Moeller, respectfully moves this Court to alter and extend the deadlines for the filing of supplements and responses set out in this Court's order of July 27, 2012, Doc. 285.

BRIEF IN SUPPORT

On July 27, 2012 this Court entered an order concerning discovery in this matter. In that order this Court ordered that the depositions it granted were to be completed by August 15, 2012. In addition this Court ordered that Mr. Moeller shall have until August 31, 2012 “to supplement his pleadings” based on the information disclosed by the Court and gathered in the depositions. The Defendants were then allowed until September 14, 2012 to respond to this filing and Mr. Moeller was allowed until September 25, 2012 to reply. Doc. 285 at 3-4.

Mr. Moeller seeks a short extension of time to file his supplemental response from August 31, 2012 to September 7, 2012. Thereafter he seeks to have the Defendants file any response on their

part on September 21, 2012 and to permit Mr. Moeller to file a reply on or before Sept. 28, 2012. This proposed schedule would only extend the deadlines set by this Court by three additional days. Counsel for Mr. Moeller seeks this adjusted schedule for the following reasons:

The depositions in this matter lasted three days. The first deposition lasted the better part of six hours. The second day of depositions involved two witnesses with each deposition lasting about two and half hours each. Finally, on the third day the deposition, one day past this Court's August 15, 2012 deadline, lasted about two and half hours¹. This is roughly thirteen hours of deposition testimony. The witnesses failed to answer certain questions that counsel believe were not protected by an order from this Court or by an evidentiary privilege. Plus, these questions are at the heart of the litigation here. Therefore counsel has had to spend significant time preparing a Motion to Compel the witnesses to answer the questions put to them at the deposition.

Because the deposition testimony is so lengthy the expert for Mr. Moeller is not able to digest the information to assist counsel in drafting the supplement or to prepare an affidavit to present to this Court. Dr. Mark Heath, counsel's retained expert is an Assistant Professor of Clinical Anesthesiology at Columbia University in New York, New York. The month of August is particularly difficult on Dr. Heath's time because of the beginning not just of the fall semester of medical school but because of the introduction of the freshman medical students. He is unable to devote the exclusive time to this matter because of his competing obligation as a professor at this medical school.

Finally, undersigned counsel is appointed to represent a condemned inmate in the State of

¹Counsel sought assistance from this Court on the morning of August 14, 2012 when the first witness failed to appear as scheduled under the Notice of Deposition. This Court allowed an additional day of deposition to remedy this problem. Doc. 303 and 307.

Nebraska where the petition was due on or before August 27, 2012. Counsel has been required to devote a goodly amount of his time to this matter to meet the deadline imposed there.

Counsel has sought the position of the Defendant's counsel as to this extended or modified schedule. Defendant's counsel does not agree to this modification.

Undersigned counsel therefore respectfully requests that this Court modify its July 27, 2012 order to permit the proposed filing schedule of filing any supplement on September 7, 2012, any response by the Defendants to be filed on September 21, 2012 and for Mr. Moeller to file a reply on or before Sept. 28, 2012.

This request for a short, three day modification of the briefing schedule is made in good faith and not for purpose of hindrance or delay.

WHEREFORE, counsel for Mr. Moeller respectfully requests that this Motion to Alter the Filing Schedule be granted as requested and detailed above.

Dated in Little Rock, Arkansas, this 24th day of August, 2012.

Respectfully Submitted,

JENNIFER HORAN

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of August, 2012, a copy of the foregoing Motion to Alter the Filing Schedule was served to United States Postal Service, postage prepaid to Assistant Attorneys General Paul Swedlund, Craig Eichstadt, Gary Campbell, and Sherri Sundem Wald, Attorney General's Office, 1302 E. Highway 14, #1, Pierre, South Dakota, 57501 as well as electronic mail (email) to Paul.Swedlund@state.sd.us.

By: /s/ Scott W. Braden
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